

FCC MAIL SECTION

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 Federal Communications Commission
 Washington, D.C. 20554

MM Docket No. 95-138

In the Matter of

Amendment of Section 73.202(b) RM-8684
 Table of Allotments,
 FM Broadcast Stations.
 (Casper, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 15, 1995; Released: January 26, 1996

By the Chief, Allocations Branch:

1. At the request of Bruce L. Erickson ("Erickson"), Hart Mountain Media, Inc. ("Hart") and Rule Communications ("Rule") (jointly referred to as "petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 9290 (1995), proposing the allotment of Channels 273A and 284A at Casper, Wyoming, as potentially the community's sixth and seventh local commercial FM transmission services. If Channels 273A and 284A are allotted at Casper with cut-off protection, petitioners also request that Rule and Hart be allowed to amend their pending applications to specify operation on Channels 273A and 284A, respectively, in lieu of Channel 247A. Petitioners filed comments in support of the proposal, and Rule and Hart reaffirmed their intention to apply for the channels, if allotted with cut-off protection. Opposing comments were filed by Mount Rushmore Broadcasting, Inc. ("Mt. Rushmore"), licensee of Stations KQLT(FM)/KASS(FM), Casper, Wyoming. Petitioners filed reply comments.

2. As indicated in the *Notice*, petitioners are three mutually exclusive applicants for Channel 247A at Casper, Wyoming, and the allotment of Channels 273A and 284A would accommodate all applicants' request for a Class A channel in Casper and avoid the need for a comparative hearing. Because of developments related to our comparative licensing procedures, we are currently unable to designate these applications for a comparative hearing or otherwise resolve these mutually exclusive applications. See *Bechtel v. Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993). Therefore, the *Notice* also proposed to allow Rule and Hart to amend their applications to specify operation on Channels 273A and 284A, respectively, and retain cut-off protection. In the event there were other expressions of interest, the *Notice* indicated that there was an additional Class A channel available at Casper.

3. In its comments, Mt. Rushmore argues that the proposed allotments would not serve the public interest and should be denied. As an initial matter, Mt. Rushmore contends that the Commission should stay the instant proposal until the resolution of the "serious challenges" to the Commission's commercial FM allotment and licensing rules raised in a petition for rule making filed over three years ago by the National Association of Broadcasters ("NAB"), which is still pending.¹ In light of the long-standing pendency of the NAB petition, Mt. Rushmore further contends that the instant petition should be decided after the Commission resolves the NAB's global challenge to the commercial FM licensing policies. Mt. Rushmore supports the NAB's petition which "demonstrated that the Commission's ever-burgeoning allotment of commercial FM stations has created adverse technical and economic consequences, to the detriment of the public interest." Thus, Mt. Rushmore claims the Commission would create a similar disaster in Casper by granting the petitioners' multi-channel allotment request. Mt. Rushmore alleges that since 1980, the Commission's purely "technical" approach to allotting new FM commercial stations to communities, without considering other relevant factors, has drastically increased the number of FM radio stations nationwide. Mt. Rushmore states that the Commission's "open-door" policy has resulted in a negative impact nationwide by overcrowding the broadcast spectrum, thereby creating decreased technical quality and value of all but the largest radio stations by limiting the stations' geographic access to a wider listening audience and greater advertising revenues. By adding more channels to an already well-served market, claims Mt. Rushmore, would only make it more difficult for existing stations to survive and serve the public. The bottom line, asserts Mt. Rushmore, is that while adding new channels may be technologically feasible, the increase in the number of failed stations has confirmed that the FM radio market may well be over-saturated, and that most new stations are not economically feasible, especially in small markets. Mt. Rushmore further asserts that adding two new channels at Casper would not serve the public interest, since the reality of the Casper radio market demonstrates such an allotment would ensure that one or more stations would fail.

4. In their reply comments, petitioners assert that Mt. Rushmore bases its objection solely on the alleged economic impact the three new competitors could have on the economic viability of existing stations in Casper, Wyoming. Petitioners submit that the Commission's policy regarding the competitive effect proposed allotments may have on existing licensees has basically been to no longer address the potential economic impact of new allotments on existing stations, citing *Pierce et al., Texas*, 8 FCC Rcd 3528, 3530-31 (1993); *FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989); and *South Hampton, et al., New York*, 10 FCC Rcd 11516 (1995). Therefore, in light of the precedent set forth above, petitioners argue that Mt. Rushmore's claim, solely on economic concerns, that the instant proposal is not in the public interest, is unpersuasive and must fail. Moreover, petitioners contend that Mt. Rushmore's criticism of the Commission's current policy of

¹ See *Review of Commission Commercial FM Allotment and Licensing Policy*, RM 92-7933, petition for rule making filed on

February 10, 1992.

disregarding the potential economic impact on existing stations should more properly be raised in the pending NAB rule making proceeding. Petitioners reaffirm their interest in the allotment of Channels 273A and 284A at Casper and urge the Commission to grant their proposal.

5. We believe the public interest would be served by allotting Channels 273A and 284A at Casper, Wyoming, since potentially it would provide the community with its sixth and seventh local commercial FM transmission services and avoid the need for a comparative hearing consistent with our precedent. *See, e.g., Copeland, Kansas*, 5 FCC Rcd 7682 (1990); *Roseburg, Oregon*, 6 FCC Rcd 4369 (1991); and *Albion, Nebraska*, 10 FCC Rcd 3183 (1995), *rev. denied*, 10 FCC Rcd 11927 (1995). An engineering analysis has determined that Channels 273A and 284A can be allotted to Casper in compliance with the Commission's minimum distance separation requirements at city reference coordinates.² Furthermore, in view of the fact there are no other timely filed expressions of interest for a Class A channel at Casper, we will allow Rule (BPH-950105ME) and Hart (BPH-950104MD) to amend their applications to specify operation on Channels 273A and 284A, respectively, and retain cut-off protection.³ *See, e.g., Copeland, Kansas, supra; Roseburg, Oregon, supra; and Albion, Nebraska, supra.*

6. Mt. Rushmore's arguments challenging the Commission's commercial FM allotment and licensing policies raise economic feasibility issues which the Commission has already determined not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, supra; Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993); and *Albion, Nebraska, supra*. Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for Rule and Hart, or any other party, to demonstrate a "demand" or need for an allotment aside from the already stated willingness of the petitioners to apply for Channels 273A and 284A at Casper and construct the proposed facilities.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1996**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Casper, Wyoming	233C, 238C, 247A, 273A, 279C, 284A, 295C

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

² The coordinates for Channels 273A and 284A at Casper are North Latitude 42-50-48 and West Longitude 106-18-48.

³ Erickson (BPH-950103MB) remains the sole applicant for Channel 247A at Casper, Wyoming.